SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 381

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,
Petitioner,

vs.

NEEDHAM PACKING COMPANY, D/B/A SIOUX CITY DRESSED BEEF, A CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

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THE CONTINENTAL-GARDEN PRINTING COMPANY, CHICAGO [illegible] 56

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Preliminary Statement.

Respondent's Brief serves one important function: *it emphasizes the extent to which the Supreme Court of Iowa misred the Arbitrator's Decision.* For, in endeavoring to justify the judgment below, Respondent found itself compelled to make even more explicit and plain the Iowa Court's comprehensive misconception of what the Arbitrator decided.

In addition, Respondent apparently regarded it as necessary to color the facts found by the Arbitrator. For example, in a footnote on page 5 of its Brief, Respondent asserts that "the strike was not an unauthorized wildcat of a few employees but was undertaken in all its phases

pursuant to firm Union policy." The Arbitrator found differently, however. He characterized the walkout as an illegal wildcat; see his Decision, at pages 29, 79, 80. Why Respondent considered it necessary to make such an assertion is unclear, unless it was in an attempt to minimize the culpability of the Company and to exaggerate that of the Union.

In any event, one thing is clear: *a fair reading of the Arbitrator's Decision simply will not support the interpretation of it adopted by the Iowa Court and embellished by Respondent in its Brief.*

The So-Called "Independent Strike Settlement" Agreement Was Regarded by the Arbitrator as a Key Factor in Determining Whether There Had Been Such a Repudiation of the Contract by the Union as to Release the Company From Its Duty to Arbitrate.

It is difficult to contain one's patience when confronted by the distortions of the Arbitrator's Decision found in Respondent's Brief. The main effort of the Brief, for over 33 pages, is to attempt to have it appear that the Arbitrator did something which, in truth and in fact, he did not do. For example, after referring to the Hart-Gilker "agreed upon terms" for settling the strike, Respondent concludes (Brief p. 13):

> The arbitrator thus concluded that because of this independent and separate strike settlement agreement, the dispute over the terms under which the strikers could return to work was itself arbitrable (Pet. App. 33, 35). In short, the arbitrator concluded that he could "arbitrate" the existence, scope and effect of the separate agreement arising outside the "provisions" of the collective bargaining agreement and base his award upon it. The Union structured its dispute, and the arbitrator his award and decision, upon this separately negotiated agreement (Pet. App. 32).

These assertions are wholly untrue.

In characterizing what the Iowa Court did, Respondent highlights the distorting process which provided a kind of rationale for vacating the Arbitrator's Decision and Award. After stating that the Iowa Court simply followed the basic principles enunciated by this Court, whereby a court's role in reviewing arbitration awards is limited, Respondent noted (Brief, p. 21):

> In reviewing the arbitrator's award in the light of this guiding principle, the state court determined that the parties had not agreed by their collective bargaining agreement to confer authority upon the arbitrator to determine disputes arising out of a strike settlement agreement and that the strike settlement agreement did not itself provide for arbitration of disputes arising thereunder.

Insofar as this is what the Iowa Court did, or thought it was doing, the simple and direct answer is that *the grievances were for wrongful discharges under the existing collective bargaining agreement*—a kind of dispute the Company was obligated to arbitrate. At no point—either in the form of the grievance, or in the long litigation ending in a decree compelling the Company to arbitrate, or in the arbitration, or in the Iowa courts thereafter—*was the dispute ever posed or represented by Petitioner* to be a "dispute arising out of a strike settlement agreement". This characterization is pure invention—contrived by Respondent and adopted by the Supreme Court of Iowa. Significantly enough, the Iowa trial court perceived the flimsy and erroneous nature of such a characterization (R. 40, 41).

The complete refutation of Respondent's assertions requires only a fair reading of Chairman Davey's Decision. Concerned with an "omelet" of issues (Arbitrator's Decision, p. 25), the Chairman was endeavoring to reach

a decision as to whether or not there had been such a complete repudiation of the contract by the Union as to justify the Company's treating the contract at an end and declining to arbitrate. This is the "arbitrability" issue with which Professor Davey was wrestling, since this Court, in its earlier decision, had, in effect, left that question open—a matter to be decided after there was a fully-developed record. 376 U. S. 247, 253.

During the arbitration proceedings, the Company asserted the "complete repudiation" contention as a defense (Arbitrator's Decision, p. 24), emphasizing that this made the principal issue one of arbitrability. Further, Professor Davey subsequently summarized the contentions of the Company (Decision, p. 68):

> 6) The employees' constant course of conduct, which included picketing entrances to the plant each morning and evening from May 12 on and attacks upon and harassment of those desiring to enter or leave Company premises until restrained from such violence by court injunction, was one that can only be held to have been complete repudiation of the contract, and particularly its grievance and arbitration provisions.
>
> 7) Distinguishing *Drake Bakeries* from the instant case, the circumstances of the Union's repudiation here are so complete and unequivocal as to require a finding that the Company is relieved from its duty to arbitrate on this fully developed record. . . . Referring to the language of the Supreme Court's decision of March 9, 1964, a more classic case of "fundamental change in relationship" between the start of the illegal strike and the date of the written grievances could not have occurred (Company brief, p. 24).

Professor Davey also noted that Petitioner, in its contentions during the arbitration proceedings, asserted that the Union had not repudiated the contract and that "the violence on which the Company lays such stress in its

repudiation argument did not occur until *after* the Company had itself repudiated the agreed-upon terms for the return of the men to work" (Arbitrator's Decision, p. 72).

These were the essential contentions of the parties considered by the Arbitrator in relationship to *the issue of arbitrability.* The Arbitrator went on to decide that there had been no repudiation—and that, consequently, the Company, on a fully-developed record, was not excused from arbitrating, in large measure because of the sequence of events: the employees, through their Union officers, had offered to end the walkout and return to work *before* the Company in effect discharged them by its "new hires" and "zero seniority" edict (Arbitrator's Decision, p. 86). In reaching his conclusion about "arbitrability", Professor Davey stated (Decision, p. 89):

> Although the Union and the employees knew they were in the wrong from a contractual standpoint in terms of Paragraphs 9 and 33 between May 11 and May 16, they at no time gave any evidence of an intent to repudiate the contractual relationship between the parties *as such,* in the total sense alleged by the Company. Furthermore, from what Company representatives had stated between May 11 and the night of May 16, the Union and the employees had every reason to think the Company wanted to continue the contractual relationship in the manner prescribed by contract. Yet, if the Chairman may be permitted one homely analogy, just at the very moment the "prodigals" had informed the Company they were ready to return home and proceed in accordance with the contract, the door is slammed in their face by Needham's zero seniority edict.

Several pages later, after emphasizing the Company's sudden springing of its "new hires" and "zero seniority" ultimatum upon the unsuspecting Union officials, Professor Davey concluded (Decision, p. 92):

> Such considerations should serve to dispose com-

pletely of the Company thesis that the fully developed record supports a distinction between the instant case and *Drake Bakeries*. Up to the night of May 16, 1961, there is no significant circumstance shown in the fully developed record to warrant a finding that the Company was released from its contractual duty to arbitrate. After May 16, 1961, as already noted repeatedly, the onus for the exacerbation and prolongation of the dispute must rest on the Company's shoulders.

It is thus absolutely certain that *Professor Davey concerned himself with the so-called independent strike-settlement agreement only in order to decide whether or not the Union had repudiated the contract so completely that, with all the facts of record, it could be held that the Company was relieved of its duty to arbitrate.* This is the only "arbitrability" issue with which Professor Davey was concerned. To attempt to twist his Decision—as the Iowa Court and Respondent have done—so as to make it appear that the basic dispute, i.e., the claim of wrongful discharge, was being submitted to arbitration under and by virtue of the so-called strike-settlement agreement, is simply to rewrite Professor Davey's Decision.

Perhaps the clearest indication of the error of the Iowa Court is to be found in Respondent's observation (Brief, p. 11, last paragraph of footnote) that the court below "found it unnecessary to decide the issue of fundamental change in view of its disposition of the proceedings." This comment is quite true. But, once it is admitted that the Iowa Court did not pass on this issue, it is plain that it never got around to considering the only issue as to arbitrability which could be decided. Realistically, therefore, when the Iowa Court held that the dispute—the wrongful discharges—was not arbitrable, it attempted to repudiate what this Court had earlier decided.

Conclusion.

If what the Supreme Court of Iowa has done, as explained and defended by Respondent, represents permissible judicial review of an arbitration decision, then, despite this Court's admonitions, the scope of review is extremely broad. For, in order to strike down an award, it is only necessary for the reviewing court to misread it and, in effect, to rewrite it.

The Chairman of the Arbitration Board knew precisely what he was doing, what issues he had to decide, what considerations were germane to those issues, and to just what extent this Court's earlier decision left open—on the Company's complete repudiation thesis—an issue of "arbitrability". His Decision is carefully and clearly written. The only way it could have been set aside—with even a shred of plausibility—was grossly to misinterpret it.

Petitioner is confident that a fair reading of Professor Davey's Decision will demonstrate, beyond all possible doubt, that *he decided issues properly before him and made an award he was empowered to make under the collective bargaining agreement.*

It is urged that the Petition be granted.

Respectfully submitted,

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